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No. 08-800

Supreme Court, U.S.
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In the
Supreme Court of the United States

LUKE P., a Minor, By and Through His Parents and Next Friends, JEFF P., *et ux.*,

Petitioners,

vs.

THOMPSON R2-J SCHOOL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* AUTISM SPEAKS, IN SUPPORT OF PETITIONERS

GARY S. MAYERSON, ESQ.
Director, Autism Speaks
Federal Legal Appeals Project
MAYERSON & ASSOCIATES
330 West 38th Street, Suite 600
New York, NY 10018
Tel.: 212-265-7200
Fax: 212-275-1735

Counsel for Amicus Curiae Autism Speaks

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Autism Speaks is a national, not-for-profit organization dedicated to increasing awareness of autism spectrum disorders; funding research into the causes, prevention, treatments and potential cures for autism, honoring and enforcing state and federal statutory entitlements, supporting effective and lasting interventions, and advocating for the needs of affected families.

Autism Speaks is the largest not-for-profit organization in the world with resources dedicated to autism research, education and treatment. It has chapters across the United States, Canada, and the United Kingdom. Autism Speaks works closely with federal, state and local governments, as well as the U.S. military, to meet the needs of the ever-growing population of children with autism and parents of children with autism for access to treatment and education.

Autism Speaks can offer valuable insights into the unique special education challenges faced by children with autism and their families, the special teaching approaches needed to get children with

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[1] Pursuant to this Court's Rule 37, we note that no counsel for any party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of Autism Speaks' amicus brief and counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

autism to learn and to "generalize" their skills across a variety of settings, and why this population, without intensive and consistent teaching support, is particularly at risk to *lose* skills and to regress.

Inasmuch as autism is universally recognized as a "pervasive developmental disorder," meeting the unique and varied needs of children with autism means developing a truly individualized and comprehensive educational program that is *reasonably calculated* to produce a meaningful and lasting educational benefit. This does not entail any guarantee of outcome, but it does speak to the need to design programming that would be reasonably *expected* to address and remediate a variety of deficit domains. There can be no such expectation absent a program that is "reasonably calculated."

The Tenth Circuit's inadequate "some benefit" standard cannot hope to meaningfully address a pervasive developmental disorder any more than a "band-aid" would be "reasonably calculated" to address the needs of someone badly injured in an automobile accident.

Autism Speaks can speak to the potential impact of the decision below on thousands of families across the nation who struggle to create productive and self-sufficient members of society. A bare "some benefit" standard is not reasonably calculated to promote even a modicum of independence and self-sufficiency. To follow that kind of standard where children with autism are concerned is to simply kick the can down the road, starting a countdown that, in many cases, ultimately will require *lifelong* institutional care.

The Tenth Circuit reversed the district court's reimbursement award in favor of Luke and his parents upon an analysis that erroneously equates an IEP that is "reasonably calculated" to provide a meaningful and lasting educational benefit with an IEP that is "guaranteed" to optimize or maximize Luke's potential.

Luke's parents have never sought any guarantees, nor have they requested any IEP "guaranteed" to optimize or maximize Luke's potential. That kind of unduly elevated standard was never genuinely at issue here. Luke's parents have, however, advocated for meaningful educational gains that are lasting, and not fleeting or illusory. They have advocated for an Individualized Educational Plan ("IEP") that is at least "reasonably calculated" to generate those kinds of gains. Indeed, while Luke's deficits are varied and profound, this is the kind of IEP that every child is entitled to under the IDEIA.

The Tenth Circuit's bare and selective "some benefit" standard is inadequate to address a pervasive developmental disorder such as autism, which seriously impairs a variety of Luke's functions. Without meaningful programming to address generalization (i.e. being able to display skills across different environmental settings, with different people), the school district's proposed IEP was not "reasonably calculated" to provide Luke with a meaningful educational benefit.

The district court so held, as did the two hearing officers in successive administrative proceedings. The district court correctly accorded due weight to the findings of the education experts. The

Tenth Circuit, however, improperly substituted its judgment for the judgment of the educational experts. The Tenth Circuit then compounded its error by creating an unduly low "some benefit" standard of care that is inconsistent with the IDEIA and Congressional intent.

Certiorari should be granted so that this Court can provide appropriate direction to the Tenth Circuit and to any other court that might be tempted to adopt an impermissibly low standard of care.

PRELIMINARY STATEMENT

Autism, a pervasive and devastating developmental disorder under the DSM-IV[2], is a 24-7 workaholic that does not know how to take a break or holiday. Rigidity, inflexibility, inattention, interfering behaviors, self-directedness and severe social and communication deficits are among the many problems that normally must be addressed in a comprehensive and systematic manner.

Unlike typically developing children, children with autism normally do not learn "incidentally" from observing what other children do. Unlike typically developing children, children with autism also have tremendous difficulty learning in a group setting. This means that children with autism necessarily must be taught differently, often with a great deal of one-to-one instruction. In order to "generalize" skills ostensibly being taught in the

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[2] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (4th ed. 2000).

classroom, most children with autism also must be taught across a variety of environmental settings.

Without intensive teaching and intervention, children with autism typically will not "generalize" the skills they ostensibly are learning in school, *i.e.*, being able to display the skill across different environments. Parents and educators must expect to have to employ the educational equivalent of a "full court press" to ensure meaningful, lasting progress and prevent regression.[3] Unfortunately, there are no easy shortcuts.

Without appropriate and effective teaching and intervention, autism ruins lives and destroys families. Absent appropriate and effective intervention, children with autism grow up to be adults with autism, often requiring costly and sometimes lifelong institutional care.[4] The only way for our society to avoid the social and financial cost of lifelong institutional care is to provide educational programming that is designed (*i.e.*, reasonably calculated) to meaningfully promote independence and self-sufficiency.

There simply must be a concerted effort to get the student to "generalize" skills ostensibly being taught in isolation. If there is no such effort by the

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[3] Prelock, Patricia E., AUTISM SPECTRUM DISORDERS 354 (2006)

[4] Residential, institutional care may come at a cost in excess of $300,000 *per year*. Accordingly, particularly in this time of economic crisis, it is all the more incumbent upon our nation to invest the effort and funds now to promote independence and self-sufficiency, and therefore avert lifelong residential placements.

school district, it is difficult, if not impossible, for the anticipated educational benefit to be real and lasting.

Considering that the National Institutes of Health and the Center for Disease Control are reporting that 1 in 150 children born today will be diagnosed with an autism spectrum disorder (nearly 1 in 100 boys),[5] effective and timely intervention is absolutely critical, not only for the child and the child's family, but for society in general.[6]

As a society, given the sheer magnitude of the problem, we cannot afford *not* to make the investment. In the past, we lost thousands to institutional care because we did not know how to effectively remediate autism. Indeed, a large part of the problem was a failure to properly identify autism.

Now that educators and scientists have acquired far more effective teaching methods and greater empirical knowledge, we cannot afford to lose an even larger generation to life-long institutional care because of an unwillingness to make the investment needed to promote independence and self-sufficiency.

In the seminal case of Board of Educ. v. Rowley, 458 U.S. 176 (1982), a case decided under

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[5] Statistically, the NIH and CDC both report that males are approximately four more times as likely as females to be diagnosed with autism.

[6] Until relatively recently, autism was a rarely-diagnosed and little-known condition, but is now more prevalent among children than Down syndrome, diabetes, cystic fibrosis, and cancer.

the Education for All Handicapped Act, this Court established the basic floor of educational opportunity as requiring a meaningful educational benefit – a benefit flowing from "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."

The IDEA, and its reauthorization as IDEIA, post-dated Rowley. This Court should grant *certiorari* to clarify the substantive requirements of the Act. This Court should clarify that IDEIA's minimum standard of care is a "meaningful benefit" standard, and that a "some benefit" standard of care is inconsistent with the letter and spirit of the Act. This Court need not offer any guarantee of outcome. However, it should declare that a school district's IEP must be "reasonably calculated" to provide the student with a meaningful and lasting educational benefit. Just as this Court declared in Rowley, a student is entitled to "educational instruction [that is] specially designed to meet the unique needs of [the student]." 458 U.S. at 188-89.

In the case at bar, while Luke was being educated by the Thompson R2-J School District's ("District") watch, Luke's "autism" scores on the Childhood Autism Rating Scale (CARS) apparently went from "mild to moderate" in 2001 to "severely autistic" in 2003. Whatever teaching the District believed it was presenting to Luke in isolation, the record reflects, and three levels of judicial review apparently concluded, that Luke was not meaningfully "generalizing" the teaching that he was being presented with. Luke was not able to display

his learning across different settings and environments to demonstrate that he had truly and genuinely learned. If anything, Luke was regressing.

Although Congress has never expressly defined what a "free and appropriate education" ("FAPE") must consist of (presumably because of the Act's "individualization" requirement), twenty seven years ago, this Court held (construing the Education for All Handicapped Children Act) that the educational benefit must be meaningful and more than a mere *di minimus* benefit. Rowley, 458 U.S. 176 (1982). *See also* O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692 (10th Cir. 1998). *Cf.* Frank G. v. Board of Educ., 459 F.3d 356 (2d Cir. 2006), *cert denied*, Board of Educ. v. Frank G., 169 L.Ed.2d 325 (2007) ("While the IDEIA does not require states to maximize the potential of handicapped children...it must provide such children with "meaningful access" to education...[the IEP] must be "likely to produce progress, not regression") (internal citations omitted); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997) (IEP must be likely to produce progress, not regression).[7]

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[7] There is, at best, *di minimus* progress where, as here, a student like Luke is not "generalizing" the skills the school district was presenting to him in isolation. Moreover, the disturbing change in Luke's assessed autism "severity" on his CARS scores from 2001-2003 would strongly suggest regression. Whatever may be argued by way of semantics, it is axiomatic that regression is inconsistent with the concept of educational "benefit."

In Deal v. Hamilton County Board of Educ., 392 F.3d 840 (6th Cir. 2004), *reh'g en banc denied*, 2005 U.S. App. LEXIS 5631, *cert. denied*, Hamilton County Dept. of Educ. v. Deal, 546 U.S. 936 (2005), a unanimous Sixth Circuit held "we agree that the IDEA requires an IEP to confer a *meaningful* educational benefit." The defendant school district in Deal petitioned this Court for *certiorari* on the grounds that IDEA does not require a "meaningful" educational benefit. This Court denied *certiorari*. This Court apparently saw no reason to disturb the Sixth Circuit's reasoning that a "meaningful educational benefit" standard is applicable under the Act. Here, however, *certiorari* is being sought because the Tenth Circuit has blessed a *lower* standard of care.

A school district should not receive credit for providing a FAPE merely because a student has achieved "some" progress. This is particularly true here, where the student has been diagnosed with a pervasive developmental disorder (autism) that has negatively impacted the student on so many different levels.[8]

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[8] In John Doe v. Board of Educ. of Tullahoma City Schools, 9 F.3d 455 (6th Cir. 1993), the Sixth Circuit employed an automotive analogy to rule that, under IDEA, school districts are required to supply the educational equivalent of a "serviceable Chevrolet" and not a "Cadillac." We agree. However, to adopt a "some benefit" standard of care where there are so many systems to assess and address is no different than allowing a car with defective brakes to pass inspection merely because the car was recently refitted with new tires. To focus on the supposed "benefit" of the new tires is to ignore more pressing problems.

Inasmuch as the student's individual needs and progress are the primary focus, FAPE must be measured from the perspective of the student's demonstrable acquisition of learning, and not merely the school district's reported efforts to try to teach the student. The key is what *expectation* may reasonably arise from the student's IEP. As always, the core issue is whether or not the IEP, as designed, is "reasonably calculated" to provide the student with a meaningful and lasting educational benefit.

The record (including three successive judicial determinations) reflects that Luke did not make overall meaningful educational progress in the public school program. If anything, Luke appeared to be getting worse. If there was any educational progress to point to, it was selective and *di minimus*.

While Luke's school district selectively pointed to Luke's ostensible attainment of one-fourth of his educational objectives as evidence of his "some progress," the record also showed that Luke had not learned fundamental life skills such as eating, toileting, sleeping, dressing and maintaining appropriate behavior. Luke's school district had not done much, if at all, to promote self-sufficiency and independence. The record reflects that Luke had not acquired even basic adaptive living skills. The record here reflects that Luke was smearing feces and ransacking his house in the evening.

Luke's parents are unlike those few parents who insist from the start on a private school setting, and who have made no *bona fide* effort to try to work with their school district in good faith. The record here shows that Luke's parents bent over backwards to try to work with their school system. It is no

wonder that Luke did so poorly in that program where, as here, Luke's school district embraced an unduly low standard of care that came with equally low expectations.

Two successive administrative decisions concluded that Luke's school district failed to provide him with a FAPE. The district court, giving due weight to such fact finding, agreed. In order to reverse the three prior determinations, the Tenth Circuit applied an impermissibly low standard of care.

There are, of course, no guarantees in life. However, without the support of IEP's that are at least "reasonably calculated" to meaningfully promote the generalization of skills, children with autism cannot hope to become self-sufficient or independent and their learning will not be real and lasting.

Without an IEP that is "reasonably calculated" to promote self-sufficiency and the generalization of skills being taught in isolation, a child with autism is merely being groomed for lifelong residential care. A "some benefit" approach may help to close a current school budget, and it might well be administratively convenient, but it will only cost far more in the long run, and here, the anticipated "costs" far transcend the obvious financial implications.

A "some benefit" standard is inconsistent with the requirements of the Act, and it is plainly inadequate for Luke and most other similarly situated children diagnosed with autism. Their "pervasive" needs require an equally pervasive

intervention approach. For children with autism, a "some benefit" standard barely scratches the surface.

ARGUMENT

I. CONGRESS IS INCREASINGLY TREATING AUTISM AS A NATIONAL PRIORITY

As the incidence of Autism Spectrum Disorder has mushroomed, Congress increasingly has treated Autism as a national priority. In recent years, autism has grown dramatically more prevalent. In 1961, it was confidently asserted that "[i]nfantile autism is a relatively rare form of schizophrenia and is not important from an epidemiological point of view." C.B. Ferster, *Positive Reinforcement and Behavioral Deficits of Autistic Children*, 32 CHILD DEVELOPMENT 437, 437 (1961), *reprinted in* CLASSIC READINGS IN AUTISM 53 (Anne M. Donnellan ed., 1985). Even in 1993, shortly after the Department of Education began collecting statistics on autism, it classified only 19,058 children between 6 and 21 as having autism.[9] *See* Office of Special Education and Rehabilitative Services, Department of Education, 26TH ANNUAL (2004) REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2006).[a] But in 2005, the Department of Education reported 192,643 autistic students between the ages of 6 and 21 – a

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[9] Autism was added as a specifically-identified category of disability under IDEA by the Education of the Handicapped Act Amendments of 1990, Pub. L. 101-467, §101, 104 Stat. 1103, 1142 (1990). It is very difficult to determine the prevalence of autism before the 1990s.

more than tenfold increase. *See* Office of Special Education and Rehabilitative Services, Office of Special Education Programs, U.S. Department of Education, Data Analysis System (DANS), 1976-2005, *Table 1-3, Students ages 6 through 21 served under IDEA, Part B, by disability category and state: Fall 2005.*[b] The Centers for Disease Control report rates as high as 1 in every 150 children. Catherine Rice, *Prevalence of Autism Spectrum Disorders – Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2002*, 56 MORBIDITY AND MORTALITY WEEKLY REPORT SS-1, 12 at 12 (Feb. 9, 2007) ("CDC, *14 Sites Study*").[c] With some 24,000 children with autism born each year, autism is now more common among children than Down syndrome, diabetes, cancer, cystic fibrosis, hemophilia, and sickle cell disease.[d] S. Rep. No. 109-318 at 3 (2006).

As the incidence of autism has grown, Congress increasingly has made autism research and education a national priority. Autism was specifically identified as a disability under IDEA in 1991. *See* 20 U.S.C. §1401(3)(a)(i); Education of the Handicapped Act Amendments of 1990, Pub. L. 101-467, Title I, §101, Title IX, §901(b)(10) to (20), 104 Stat. 1103, 1142, 1143 (1990). The Children's Health Act of 2000 directed the National Institutes of Health to expand and intensify autism research and mandated the creation of an Interagency Autism Coordinating Committee to coordinate autism research and other efforts within the Department of Health and Human Services. Children's Health Act of 2000, Pub. L. 106-310, Title I, 114 Stat. 1101 (2000). In 2004, IDEA was amended to encourage the Department of Education to support the development of programs to train special education

teachers in autism disorders, and provide technical assistance and in-service training to schools and personnel servicing children with autism spectrum disorders. 20 U.S.C. §1462(b)(2)(G), 20 U.S.C. §1463(c)(8)(D). *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, Title I, 118 Stat. 2647, 2677 & 2682 (2004).

Most recently, Congress enacted the Combating Autism Act of 2006 to dramatically increase funding for autism research, detection and intervention and to promote interagency coordination of autism-related activities through the NIH. *See* Combating Autism Act of 2006, Pub. L. 109-416, 120 Stat. 2821 (2006); S. Rep. No. 109-318 at 18-20.

One day, perhaps one day in the not too distant future, scientists will identify the causes of autism. Until that day comes, however, there is an entire generation of children and adolescents who need and who are entitled to appropriate and effective intervention and educational programs. What we do with that generation now will have life-long consequences, one way or another.

II. WITH APPROPRIATE PLACEMENTS, PROGRAMMING AND SERVICES, MANY OF THE DEVELOPMENTAL DEFICITS ASSOCIATED WITH AUTISM CAN BE AMELIORATED AND REMEDIATED

Autism is a spectrum disorder encompassing a range of developmental disorders related to impaired social function, impaired communication and repetitive, stereotyped behaviors. The degree and manifestation of impairments can vary dramatically from individual to individual, and the spectrum of disorders includes ASD, Asperger's Disorder,

Pervasive Developmental Disorder, Not Otherwise Specified ("PDD-NOS") and Rett's Syndrome. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION at 69-75 (4th ed. 2000) ("DSM-IV-TR"); S. Rep. No. 109-318, 2-3 (2006). Most children with autism show an "inability to relate themselves in the ordinary way to people and situations from the beginning of life." Leo Kanner, *Autistic Disturbances of Affective Contact*, 2 NERVOUS CHILD 217 (1943), *reprinted in* CLASSIC READINGS IN AUTISM at 41 (Anne M. Donnellan ed., 1985) (emphasis omitted).

Impaired communication is another classic symptom of autism. Approximately 40 percent of children with autism do not speak, and others have difficulty learning to use language for communicative purposes. S. Rep. No. 109-318 at 2; DSM-IV-TR at 70. Many children with autism also demonstrate restricted and stereotypical patterns of behavior or interests, an insistence on predictability, and great difficulty coping with unexpected changes to their routine. S. Rep. No. 109-318 at 3; DSM-IV-TR at 71.

Symptoms generally manifest early, usually before the child's third birthday and as soon as eighteen months or earlier; in some cases symptoms are present almost from birth.[10] S. Rep. No. 109-318 at 3, 9; Autism Spectrum Disorder Expert Working Group, Interagency Autism Coordinating Committee, National Institute of Mental Health, Department of Health and Human Services, AUTISM SPECTRUM

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[10] The Working Group was created by the Interagency Autism Coordinating Committee at the National Institute of Mental Health. S. Rep. No. 109-318 at 2.

DISORDERS ROADMAP (May 16, 2005) ("Roadmap").[e] Yet children with autism frequently are not identified until after they have entered the public school system. S. Rep. No. 109-318 at 3, 9; Roadmap at 8.[11]

While the cause or causes of autism are still unclear, there is broad agreement that the symptoms of autism often can be significantly ameliorated and remediated. Appropriate education offers the possibility that children with autism can achieve a great deal of self-sufficiency and become functioning, contributing members of society rather than permanent financial and emotional burdens on their families and on the public treasury.[12]

Parents cannot allow their child to languish in an inappropriate setting when every passing moment erodes potential benefits that can never be regained. For these children and their parents, "every moment counts." Laurie Tarkan, *Autism Therapy Is Called*

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[11] With a median age at diagnosis of 52-56 months, half of autistic children are not diagnosed until they are nearly 5 years old or later. Catherine Rice, *Prevalence of Autism Spectrum Disorders: Autism and Developmental Disabilities Monitoring Network, Six Sites, United States, 2000*, 56 MORBIDITY AND MORTALITY WEEKLY REVIEW SS-1, 1 at 12 (Feb. 9, 2007). In some locations, the median age of diagnosis is 66 months, meaning that half of children diagnosed with autism are not identified until after they are more than 5 ½ years old. CDC, *14 Sites Study* at 20.

[12] For descriptions of autistic children who have grown into productive – even remarkable – adults, *see, e.g.*, Oliver Sacks, AN ANTHROPOLOGIST ON MARS 244-296 (1995); Clara Claiborne Park, EXITING NIRVANA (2001); Stephen M. Shore, BEYOND THE WALL (2001); Kamran Nazeer, SEND IN THE IDIOTS (2006).

Effective, but Rare, N.Y. TIMES, Oct. 22, 2002 (describing the "horrible feeling of time slipping away and nothing being done" when parents of children with autism don't have access to appropriate treatment)[f]; *see also* County Sch. Board of Henrico County v. R.T., 433 F. Supp. 2d 692, 696 (E.D.Va. 2006) ("a critical window of developmental opportunity was closing" for a child who was not receiving an adequate public education). "Children with autism can't afford to waste a second... With the right kind of early intervention, they can learn. Without it, there's no hope." Leslie C. Feller, *When Autistic Child's Growth Is at Stake*, N.Y. TIMES, Apr. 25, 1999 (internal quotation omitted).[g] Forcing a child with autism to remain in a placement or program that is not genuinely working can have a calamitous and irreparable impact on the long-term development of the child, a decision no parent should have to make.

III. CONGRESS HAS RECOGNIZED INDEPENDENCE AND SELF-SUFFICIENCY AS IMPORTANT EDUCATIONAL GOALS UNDER THE IDEIA

Autism is universally recognized as a *pervasive* developmental disorder that significantly impacts behavior, communication and socialization. By focusing so rigidly on a few, highly selective "academic" measures and by invoking its "some benefit" standard, the Tenth Circuit was looking at Luke and his unique needs through an unduly narrow lens. Congress, taking a broader view has expressly recognized in the Act, as part of an important "national policy," that "self-sufficiency" and independence are *educational* goals and outcomes for *all* children with eligible disabilities. 20

U.S.C. §1400(c)(i), entitled "Congressional Findings and Purpose," provides in pertinent part: "Improving educational results for children with disabilities is an essential element of our national policy of ensuring...independent living and economic sufficiency."

Similarly, 20 U.S.C. §1400(d) provides that one of the stated "purposes" of the Act is: "[T]o ensure....services designed to meet their unique needs and prepare them for employment and independent living." We respectfully urge that the Tenth Circuit glossed over these important purposes.

Once there has been a FAPE deprivation (as the record reveals here) the district court's inquiry on Prong II properly focused on whether or not Boston Higashi is appropriate, i.e., whether it is designed to be effective and provide a meaningful educational benefit to Luke. The record firmly supported three successive judicial determinations that Boston Higashi is "appropriate" and thus reimbursable under the Burlington/Carter test. Sch. Comm. of Burlington, Mass. v. Dept. of Educ. of Mass., 471 U.S. 359 (1985); Florence County Sch. Dist. IV v. Carter, 510 U.S. 7 (1997).

IV. THE TENTH CIRCUIT DEPRIVED LUKE AND OTHER SIMILARLY SITUATED STUDENTS THEIR RIGHT TO A "MEANINGFUL EDUCATIONAL BENEFIT" STANDARD

Apart from the Tenth Circuit, the Circuits seem to agree on the basic principles that guide the analysis of whether a disabled child has been provided a FAPE. In order to provide a FAPE, the IEP must be "reasonably calculated" to provide a

"meaningful benefit." This is not to say that the IEP is "guaranteed" to provide a "meaningful benefit," but simply that it must be "reasonably calculated" to allow the child to make meaningful progress.

It is well settled among all the Circuits that states are not required to maximize a disabled child's ability to fulfill his or her full academic potential. The IDEIA requires that the individual child's unique and individual characteristics and capabilities be considered when evaluating whether he or she has received a FAPE. The Tenth Circuit erred in equating "meaningful benefit" with a guaranteed result or optimal benefit.

The issue may partly be the product of semantics. In applying Rowley, various Circuit courts have used the terms "some benefit" and "meaningful benefit" interchangeably. Rowley interpreted the Education for All Handicapped Children Act ("EHA"), which, after revision, was renamed as the Individuals with Disabilities Education Act, *i.e.*, IDEA.

In 1997, Congress amended the IDEA, obligating schools to provide children with disabilities with more than "some educational benefit," representing a significant shift in the focus of the disability education program. The focus was no longer to simply provide access, but to ensure that a child could attain a "meaningful benefit" once educational access was provided.

This shift is also evident in circuit decisions interpreting Rowley since 1997. The Ninth Circuit recently recognized that the circuits often use "some benefit" and "meaningful benefit" interchangeably,

and further that *meaningful* benefit was the appropriate standard as a result of the 1997 amendments to the IDEA. N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1212-13 (9th Cir. 2008). A survey of circuit courts shows that the vast majority adheres to the "meaningful benefit" standard, and defines such standard as more than "some benefit" as defined by the Tenth Circuit in this case.[13]

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[13] *See* Mrs. B. v. Milford Board of Educ., 103 F.3d 1114, 1120 (2nd Cir. 1997) ("While the Act does not authorize a court to impose a particular substantive educational standard on the state or to require equality of opportunity for the handicapped in education, a state IEP must be reasonably calculated to provide some meaningful benefit.") (internal citations omitted); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 182, 184 (3d Cir. 1988) (The IDEA "calls for more than a trivial educational benefit" and requires a satisfactory IEP to provide "significant learning," and confer "meaningful benefit."); James Hall v. Vance County Board of Educ., 774 F.2d 629, 636 (4th Cir. 1997) ("Clearly, Congress did not intend that a school system could discharge its duty...by providing a program that produces some minimal academic advancement, no matter how trivial."); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 347 (5th Cir. 2000) ("[W]e set forth four factors that serve as an indication of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA."), Deal v. Hamilton County Board of Educ., 392 F.3d 840, 862 (6th Cir. 2004) ("[W]e agree that the IDEA requires an IEP to confer a meaningful educational benefit gauged in relation to the potential of the child at issue"); Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007, 1011 (8th Cir. 2006) ("Accordingly, we are satisfied he was provided with meaningful educational benefit."); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) ("The district court should have asked the more pertinent question of whether the [program] was appropriately designed and implemented so as to convey...a meaningful benefit."); S.S. v.

Here, the Tenth Circuit erroneously concluded that because Luke had made "some progress" in a selective sense that he made appropriate progress. Unfortunately, the Tenth Circuit glossed over three successive fact findings that found not only little progress, but in fact, regression.

Although the Tenth Circuit ostensibly invoked the standard first enunciated by this Court in Rowley, the Tenth Circuit failed to fully and accurately *apply* the Rowley standards. This Court in Rowley set forth the requisite analysis, and made clear that an individualized educational approach that recognizes the child's "unique needs" is precisely what is statutorily mandated. Rowley, 458 U.S. at 181, 187, 188-89, 194, 198. The educational approach must be one that is "reasonably calculated" to provide the student with educational benefit.

It is clear that, "our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency" is a goal at the heart of the IDEIA. *See* 20 U.S.C. §§ 1400 (c)(i), 1401. With our nation in fiscal crisis, independent living and economic self-sufficiency are even more critical.

Generalizing skills across various domains, carrying over what is learned at school and transferring those skills into the home and community, is an integral part of developing self-

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Howard Road Academy, 2008 U.S. Dist. LEXIS 95501 (D.C. 2008) ("[T]he Court must ask whether the IEP was appropriately designed and implemented so as to convey a meaningful benefit to S.S.").

sufficiency and paving the way for independent living.

Although the Tenth Circuit has protested that its hands are tied by the law, such is not the case. Here, the Tenth Circuit has tied its own hands behind its back. It is essential that this Court grant *certiorari* so that it may clarify the applicable substantive standard under IDEA. This Court should clarify that the applicable standard is one requiring an IEP that is at least "reasonably calculated" to provide a meaningful and lasting educational benefit.

CONCLUSION

For the foregoing reasons, *amicus curiae*, Autism Speaks, respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY S. MAYERSON, ESQ.
Director, Autism Speaks
Federal Legal
Appeals Project

MAYERSON & ASSOCIATES
330 West 38th Street,
Suite 600
New York, NY 10018

Counsel for Amicus Curiae
Autism Speaks [14]

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[14] We also gratefully acknowledge the assistance of Jennifer M. Frankola and Brianne N. Dotts, law graduates currently awaiting admission.

ENDNOTES

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[a] Available at http://www.ed.gov/about/reports/annual/osep/2004/26th-vol-2.pdf (accessed December 22, 2008).

[b] Available at http://www.ideadata.org/tables29th/ar_1-3.xls (accessed December 22, 2008).

[c] Available at http://www.cdc.gov/mmwr/PDF/ss/ss5601.pdf (accessed December 22, 2008).

[d] Available at http://www.genome.gov/10001204 (Down, cystic fibrosis, hemophilia, sickle cell disease); http://ndep.nih.gov/diabetes/youth/youth.htm (diabetes); http://seer.cancer.gov/csr/1975_2004/results_merged/sect_28_childhood_cancer.pdf (cancer) (all sites accessed December 22, 2008).

[e] Available at http://iacc.hhs.gov/reports/2005/services-subcommittee-report-may16.shtml (accessed December 22, 2008).

[f] Available at http://query.nytimes.com/gst/fullpage.html?sec=health&res=9C05E0D71F3DF931A15753C1A9649C8B63 (accessed December 22, 2008).

[g] Available at http://query.nytimes.com/gst/fullpage.html?sec=health&res=9503E2D9143AF936A15757C0A96F958260 (accessed December 22, 2008).